



VOSH PROGRAM DIRECTIVE: 02-006A

ISSUED: September 1, 2000

SUBJECT: Abatement Verification Regulation, § 307 of the VOSH Administrative Regulations Manual (ARM) - Enforcement Policies and Procedures

A. Purpose.

This directive transmits to field personnel the revised enforcement policy and procedures for the Abatement Verification Regulation, VOSH Administrative Regulations Manual (ARM), § 307.

This Program Directive is an internal guideline, not a statutory or regulatory rule, and is intended to provide instructions to VOSH personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.

B. Scope.

This directive applies to all VOSH personnel.

C. Reference.

OSHA Instruction CPL 2-0.114 (May 28, 1998)

D. Cancellation.

VOSH Program Directive 02-006 (February 15, 2000)

E. Action.

The Chief Deputy Commissioner, Directors and Managers shall assure that the procedures established by this program directive are followed.

F. Effective Date.

September 15, 2000

G. Expiration Date.

Not Applicable.

H. Background.

1. On May 8, 1991, the General Accounting Office (GAO) issued a report to Congress (GAO/HRD-91-35 OSHA: Confirming Abatement of Hazards) on the adequacy of OSHA's policies and procedures for determining whether serious hazards have been abated. The GAO found OSHA's policies incomplete in two ways: (1) they do not require, but merely request, employers to provide evidence of abatement, and (2) they inadequately address verification of abatement of hazards found at construction worksites. OSHA published a final rule to remedy these deficiencies in the Federal Register on March 31, 1997 (67 FR 15324). The Virginia Safety and Health Codes Board enacted the abatement verification regulation on December 15, 1997.

The new regulation codifies, simplifies and streamlines the abatement certification procedures that VOSH has previously used. The new procedures will reduce both employer's and VOSH's administrative and paperwork burdens, enhance employee participation in the abatement process, increase the number of cited hazards that are quickly abated, and standardize VOSH's abatement procedures.

2. Important terms and concepts.

- a. ***Abatement verification*** includes abatement certificates, abatement documents, abatement plans, and progress reports.
- b. ***Affected employee*** means those employees who are exposed to the hazards(s) identified as violations(s) in a citation. This term is critical for the proper application of paragraph H of §307, VOSH ARM, ***Employee notification***.
- c. ***Final order date*** means:
 1. For an uncontested citation item, the fifteenth working day after the employer's receipt of the citation;
 2. For a contested citation item:
 - (A) Date that a formal settlement agreement is signed by VOSH; or
 - (B) The thirtieth day after the date on which a decision or order of a circuit court judge has been entered; or
 - (C) The date upon which the Virginia Court of Appeals issues a decision affirming the violations in a VOSH case.
 3. ***Movable equipment*** means a hand-held or non-hand-held machine or device, powered or unpowered, that is used to do work and is moved within or between worksites. Hand-held equipment is equipment that is hand-held when operated. Basically, hand-held equipment is equipment that can be picked up and operated with one or two hands, such as a hand grinder, skill saw, portable electric drill, nail gun, etc.

4. **Worksite** is, for the purpose of enforcing this regulation, the physical location specified under the heading "Description" in the citation; if no location is specified, the worksite shall be the inspection site where the cited violation occurred.

I. Certifications. The effective date of the Virginia regulation is December 15, 1997. VOSH will apply the regulation for all inspections initiated after December 16, 1997. The policies and procedures contained herein supersede the VOSH FOM's guidance on verification of abatement found in paragraph A.3. of Chapter IV.

1. Except for the application of tags on movable equipment [VOSH ARM, § 307 J.] requiring attachment of the tag or citation immediately after receiving the citation, the abatement verification regulation does not impose any requirements on the employer until a citation item has become a final order of the Commissioner.
2. All "final order" citation items, no matter what the characterization, require abatement certification within 10 calendar days of the abatement. Where there has been a contest of a violation or abatement date (not penalty), the abatement date is calculated by adding the original amount of time for abatement to the final order date.
3. Employers are not required to certify abatement for violations which they promptly abate during the on-site portion of the inspection and whose abatement the CSHO observes. Regional Directors may use their discretion in extending the "24 hours" time limit to document abated conditions during the inspection. Observed abatement will be documented on the OSHA 1-B for each violation following the guidelines of the VOSH Field Operations Manual (FOM) Chapter IV, as well as on the citation.
4. By regulation [VOSH ARM, § 307 E.1.], all willful and repeat citations require abatement documentation, such as written, videographic or photographic evidence of abatement.
5. Also by regulation [VOSH ARM, § 307 E.1.], the employer must provide abatement documentation for any serious violation for which the Agency indicates on the citation that such abatement documentation is required. VOSH policy is that all serious citations will require abatement documentation. Where, in the opinion of the Regional Director, abatement documentation is not required for a serious violation, the reasoning will be noted in the case file.

This directive sets new policy regarding whether an employer must provide abatement documentation for moderate and low gravity citations. Now all serious violations, no matter the gravity will require abatement documentation.

6. For abatement periods greater than 90 calendar days, the regulation allows the Regional Director flexibility in either requiring or not requiring monitoring information. Note that paragraphs F. and G. of § 307 of the VOSH ARM have limits; the Regional Director is not allowed to require abatement plan for abatement periods less than 91 days or for citations characterized as other-than-serious. Progress reports may not be required unless abatement plans are specifically required. The requirement for abatement plans and progress reports must be indicated for the citation item to which they relate. The regulation places an obligation on employers, where

necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. One way of ensuring that interim protection is included in the abatement plan is to note this requirement on the citation. There is nothing in this directive or the regulation prohibiting progress reports as a result of settlement agreements.

7. All settlement agreements (informal, formal, and corporate-wide) that have citation(s) characterized as "Section 17" or "Unclassified" must contain language stating that the employer must comply with the requirements of VOSH ARM, § 307 for all final order citations.
8. Only equipment, whether hand-held or not, which is moved within the worksite or between worksites, is required to be tagged. The tag is intended to provide an interim form of protection to employees through notification for those who may not have knowledge of the citation or the inherent hazardous condition. Compliance Officers should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement [VOSH ARM, § 307 J.] because the tagging provision is triggered upon movement of the equipment.
9. Tag-related citations must be observed by a CSHO before a citation is issued for failure to initially tag cited movable equipment. OSHA must be able to prove the employer's initial failure to act (tag the movable equipment upon receipt of the citation). Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation may be issued for failure to maintain the tag or copy of the citation using VOSH ARM, § 307 J.6.
10. An initial minor non-substantive omission in an abatement certificate (e.g., lack of a definitive statement stating that the information being submitted is accurate) should be considered a *de minimis* violation of the regulation. If there are minor deficiencies such as omitting the signature or date, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the date stamp of the Regional Office can serve as the date on the document. A certification with an omitted signature should be returned to the employer to be signed, when the Regional Director believes it would be beneficial.
11. Like tag-related citations, evidence of an employer's failure to notify employees by posting must be obtained at the worksite. Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees [VOSH ARM, § 307 H.2.], the employer may post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives or may otherwise communicate fully with affected employees and their representatives about abatement activities. The CSHO must determine not only whether the documents or summaries were appropriately posted but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used.
12. As a matter of policy, a Petition for Modification of Abatement Date (PMA) received and processed in accordance with the guidance of the VOSH FOM will suspend the 10-day time period for receipt of the abatement certification for the item for which the PMA is requested. Thus, no citation will be issued for this item for failure to submit the certificate within 10 days of the abatement date. If the PMA is denied, the 10-day time period for submission to VOSH begins

on the day the employer receives notice of the denial.

13. Citations issued to construction companies are issued to the employer, not to the construction site or project. In many cases, this means that the citation and the need for abatement and abatement certification can continue beyond the existence of a particular construction project.

Violations which are specific to a particular construction site may sometimes be abated by completion of that particular project. For example, a floor hole may be abated by installation of the stairway below the hole. The need for guardrails on a roof may be abated by the end of roofing work. In these cases, the employer must certify that the hazard is eliminated by completion of the project or closure of the construction site.

Other violations, however, which are related to required programs, training, or problems with specific equipment may only be abated by establishing the program, conducting the training, or repairing or guarding the equipment in question, or removing it from service. The employer must certify that these deficiencies have been corrected in a manner that will protect all employees in the company from the cited hazards. For example, where personal protective equipment is not provided, the employer must demonstrate that the equipment has been acquired, or that employees are no longer exposed to the hazard which made it necessary; or, where fall protection training is required, the employer must certify that all its employees exposed to fall hazards have received the requisite training.

J. Follow-up Procedures and Citation Issuance

Normally, follow-up inspections will be used to determine the status of abatement when verification is not received. When the work site is still active or the employer's main office is located in the region, follow-up inspections will be conducted under the following procedures:

1. If abatement certification and any required documentation are not received within 13 calendar days after the abatement date [the regulation requires filing within 10 calendar days after the abatement date; and another 3 calendar days is added for mailing], the Compliance Manager may either telephone the employer and remind him/her of the requirement to submit the material or conduct a follow-up inspection.
2. If abatement verification documents are not received within 7 calendar days after the telephone call, the Compliance Manager will schedule a follow-up inspection. Whether or not any failure to abate violations are discovered, a single other-than-serious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation.

Follow-ups will not be conducted and the Compliance Manager may follow the procedures in K. under the following circumstances:

3. Where the main office of the employer is located in another state and the work site is closed.

4. Where the main office of the employer being cited is physically located in another regional jurisdiction and the work site is closed, the Compliance Manager having jurisdiction over the work site will proceed as if the employer's main office were in the Compliance Manager's own jurisdiction, and notify the affected Regional Office of the communication with the employer.

K. Citation Issuance Procedures.

Citations for failure to certify can be issued without formal follow-up activities by following the procedures identified below except as provided in paragraph J:

1. If abatement certification and any required documentation are not received within 13 calendar days after the abatement date [the regulation requires filing within 10 calendar days after the abatement date; and another 3 calendar days is added for mailing], telephone the employer and remind him/her of the requirement to submit the material, and tell the employer that a citation may be issued.
1. If abatement verification documents are not received within 7 calendar days after the telephone call, issue a dunning letter to the employer.
2. If the certification and/or documentation is not received within the next 7 calendar days, a single other-than-serious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation. This "other" citation will be issued under the same inspection number which contained the original violations cited. The "abatement date" for this citation shall be set 30 days from the date of issuance.
3. If abatement certification and/or documentation is not received by the time that the 30-day abatement period expires, the Compliance Manager will schedule a follow-up inspection. Where a follow-up inspection cannot reasonably be conducted the Compliance Manager shall note the reason in the case file, i.e., site closed and employer out of state.

Notes:

- a. During the time between the reminder letters and citation issuance, efforts should be made to speak with the employer and determine why he/she has not complied. All communication efforts will be documented in the case file.
- b. For those rare instances where the reminder letter is returned to the Regional Office by the Post Office as undeliverable and telephone contact efforts fail, the Regional Director has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certificate.
5. For those situations where the abatement date falls within the 15-day informal conference time period, and an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's characterization or abatement period is to be modified.

L. Penalties.

1. The penalty for failing to submit abatement certification and/or abatement documentation [VOSH ARM, §§ 307 D. and E.] will be \$1,000. No adjustments for size, history or good faith will be given.
2. The penalty for not notifying employees and tagging [VOSH ARM, § 307 H.1, H.2, H.4, J.1, J.2, J.3., J.5. and J.6] will follow the same penalty structure (unadjusted \$3,000) which is currently being applied for failure-to-post citations in the VOSH FOM, Chapter IV C.2.n.(2)(c).

M. Special Enforcement Situations.

1. A farming operation with 10 or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months is not exempt from VOSH inspection. The inspection may include all working conditions covered by VOSH standards, including Field Sanitation, § 1928.110, and Temporary Labor Camps.
2. Construction activities pose situations requiring special consideration.
 - a. Construction site closure or hazard removal due to completing of the structure or project will only be accepted as abatement without certification where a CSHO directly verifies the site closure. Without CSHO-observed verification, the employer must certify to VOSH that the hazards have been abated by the submission of an abatement certificate. Site closure is an acceptable method of abatement.
 - b. Equipment-related and all program-related (e.g., crane inspection, hazcom, respirator, training, competent person, qualified persons, etc.) violations will always require employer certification of abatement. Where the construction site which was inspected is closed, follow-up inspections may be initiated at the employer's main office, and may include additional construction sites as necessary to insure that the violations have been abated. For situations where the main office of the employer being cited is physically located in another regional jurisdiction, the Regional Director having the jurisdiction over the work site will proceed as if the employer's main office were in the Regional Director's own jurisdiction, and notify the affected Regional Office of the communication with the employer.

Where a follow-up inspection to verify abatement is deemed necessary, the affected Regional Offices will determine the most efficient and mutually beneficial approach to conducting the inspection.

N. Case File Management.

1. The closing of a case file without abatement certificate(s) must be justified through a statement in the case file by the Regional Director or his/her designee, addressing the reason for accepting each uncertified violation as an abated citation.

2. The Regional Offices are encouraged to review employer-submitted abatement verification materials as soon as possible but no later than 30 days after receipt. If the review will be delayed, notify the employer that the material will be reviewed by a date certain, and that the case will be closed, if appropriate after that time.
3. As in the past, the decision of whether to keep abatement documentation (photos, employer programs, etc.) is left to Regional Office policy. The regulation's requirement for their submission was to assist the Regional Directors in determining abatement.

O. Outreach. To encourage voluntary compliance, the subject matter of the regulation must be distributed to the affected employees and employers. Regional Offices are encouraged to actively seek out employer and employee groups to inform them of the regulation. The National Office prepared outreach materials for this regulation which are available through the Regional Offices and the OSHA homepage. Some suggested outreach approaches are:

2. Opening conference. During the opening conference the Compliance Officer should explain to the employer the advantages of immediate abatement and that there are no certification requirements for violations quickly corrected during the inspection. The agency's new Form 197 (Warning tag) is available through the normal procurement process by the Regional Office. Compliance Officers are encouraged to offer "WARNING TAGS" to employers during the inspection. CSHOs must not apply the tags to any equipment; this is an employer responsibility.
3. Closing conference. During the closing conference, the Compliance Officer should thoroughly explain to the employer the abatement verification requirements.
 - a. Abatement certification is required for all citation item(s) which the employer receives except for those citation items which are identified as "Corrected During Inspection."
 - b. The violation(s) that will reflect on-site abatement and will be identified in the citations as "Corrected During Inspection" shall be reviewed at the closing conference.
 - c. Abatement documentation, the employer's physical proof of abatement, is required to be submitted along with each willful, repeat and serious violations. To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed.
 - d. Where abatement periods for citations are expected to exceed 90 calendar days, the submission and requirements of abatement plans and progress reports are to be explained.
 - e. The required placement of tags or the citation [VOSH ARM, § 307 J.] must also be discussed at the closing conference if it has not been discussed during the walkaround portion of the inspection.
3. Incorporate VOSH's abatement verification policy and requirements into local speeches, presentations, press releases, or other public information. A special effort should be placed on approaches that can reach those small employers who would not normally be informed about new VOSH standards or regulations.

4. Initiate mailing programs to local industry associations and employee unions, to publicize the regulation and encourage voluntary compliance.

Jeffrey D. Brown
Commissioner

Attachment: Appendix A, Steps of Citation Issuance for VOSH ARM, § 307 D. and E.

Distribution: Commissioner of Labor and Industry
Chief Deputy Commissioner
Deputy Commissioner
Directors and Managers
VOSH Compliance Staff
Cooperative Programs Staff
Legal Support Staff
OSHA Regional Administrator, Region III

Appendix A

Steps of Citation Issuance for VOSH ARM § 307 D. and E.

